

No. 13,094

IN THE
United States
Court of Appeals
For the Ninth Circuit

ANTONE PAGLIERO and ARTHUR PAGLIERO,
general partners doing business as
Technical Porcelain & Chinaware Co.,
Defendants-Appellants,

VS.

WALLACE CHINA Co., LTD., a Corporation,
Plaintiff-Appellee.

Appellants' Reply Brief

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Appellants' Reply Brief

Appellants believe that this reply brief can best serve the purpose of helpfulness by dividing the discussion into three parts: Part I—Uncontroverted facts and law, Part II—Wallace errors in stating the record, and Part III—Fallacies of the Wallace arguments. Part I treats the Federal cause of action for trade-mark infringement separately from the Federal cause of action for unfair competition.

PART I.

**Facts and Law with Respect to the Trade-Mark Cause of Action
Not Challenged or Controverted by Wallace**

(1) Tepco has stated as a fact that *no trade-mark is involved in this litigation*, that there are no allegations directed to trade-marks either in the complaint, in the motion for preliminary injunction, or in the supporting affidavits, or in the order to show cause (Tepco brief, p. 14). This position is not challenged nor can it be controverted by reference to this record.

(2) Whatever the names "Hibiscus," "Magnolia," "Tweed" or "Shadowleaf" may be characterized in legal parlance, they are not registered trade-marks and so *no registered trade-marks are involved in this case*. This latter was the holding of the Trial Judge (R. 84).

These facts being admittedly true, and there being no diversity of citizenship, the Court was without jurisdiction to adjudicate ownership, validity or infringement of a trade-mark. It is axiomatic that if there is no registered trade-mark under the Lanham Act, there is no jurisdiction under the Lanham Act for trade-mark infringement. It is just that simple.

In *Old Reading Brewery, Inc. v. Lebanon Co.*, F.S.; 92 U.S.P.Q. 38 (D.C., Penn.), suit was brought for infringement of the trade-mark "Old Reading Beer" and for infringement of plaintiff's exclusive right in and to phrases and trade-marks used to identify plaintiff's beer, such as "Pennsylvania Dutch" and "Traditionally Pennsylvania Dutch"; it was further alleged that such acts constituted unfair competition. The question of Federal jurisdiction arose on plaintiff's motion to remand the case to

the state court. As to the trade-mark cause of action it was held (p. 40):

“There being no allegations that the alleged infringement involves a registered trade mark, such alleged infringement presents no substantial federal question. In the absence of diversity of citizenship or a registered trade mark, this Court is without jurisdiction to adjudicate the validity or infringement of such trade mark, * * *”

In *Allen v. Barr*, 93 F.S. 589; 87 U.S.P.Q. 194 (D.C., Mich.), suit was brought for infringement of an unregistered, descriptive trade-mark and for unfair competition. On the trade-mark cause of action, the Court held (p. 597):

“There being neither diversity of citizenship nor a registered trade mark under any Act of Congress present here, this Court is without jurisdiction to adjudicate the validity or infringement of plaintiff’s trade mark.”

(3) The names “Hibiscus”, “Magnolia”, “Tweed” and “Shadowleaf” are not used by Wallace to indicate source of origin but merely to identify certain designs and distinguish one design from another (Tepco brief, pp. 14-15). This position is conceded by Wallace as shown by its brief, p. 3:

“These trade names are used in identifying specific and distinctive patterns originated by Plaintiff.”

This is confession that Wallace used these names only to identify and distinguish one design from another and not to indicate source of origin of the product or distinguish Wallace products from those of others as required by the Lanham Act.

Words which are incapable of indicating origin and merely identify the product or some characteristic of the product cannot function as trade-marks. See *Ex parte Inter-state Bakeries*, 91 U.S.P.Q. 340, where the words "Honey Wheat" were refused registration under the Lanham Act because they merely described the principal ingredients and could not indicate the origin of the product.

(4) Although Wallace refers throughout its brief to the names "Hibiscus", "Magnolia", "Tweed" and "Shadowleaf" as "trade names", these names do not come within the definition of trade names under the Lanham Act (Tepco brief, pp. 19-22). No effort is made by Wallace to show that these names identify Wallace's business, vocation, or occupation as required by 15 U.S.C.A. § 1127 to qualify them as *bona fide* trade names.

(5) Tepco has charged that the words "Hibiscus", "Magnolia", "Tweed" and "Shadowleaf" are generic descriptive words which are incapable of exclusive ownership. These words describe the designs in the very words that the public has used to describe similar designs for many years. It would be unthinkable for anyone to obtain the exclusive right to or a private monopoly in the words "California Poppy" to describe a design which is a representation of a California Poppy, and yet that is precisely Wallace's position. Its only showing of its alleged ownership is its adoption and use of these words. Mere adoption and use of such words as a matter of law does not establish exclusive ownership.

Courts guard the public and other manufacturers against the establishment of a trade-mark or a trade name monopoly taken from the existing vocabulary.

(6) Of real importance also is that Wallace does not deny the principle, or the applicability of the rule announced by the Supreme Court in *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485 (Tepco brief, pp. 22-23 and 38-39). Wallace attempts to distinguish this case by saying that it differs on its facts. However, the differences are not pointed out. If there be differences of fact, and there are because every case presents different facts, it is the rule of law which is applicable here. The rule enunciated by the Supreme Court is, that if a bill is obviously devoid of equity upon its face, and the defect is incapable of remedy by amendment, then the Court of Appeals may order the dismissal of the complaint, upon an appeal from an order granting a temporary injunction, before an answer is filed or proof taken. Nothing could be clearer than that this rule is applicable to this case, as there is no equity in the complaint for Federal trade-mark infringement where no Federal trade-mark is even alleged. No amendment can cure this fatal defect as the Trial Court found no Federal registered trade-mark is involved in this suit.

**Facts and Law Not Challenged by Wallace in Connection
with the Unfair Competition Cause of Action**

(1) Wallace states that jurisdiction of the unfair competition cause of action is based upon this Court's opinion in *Stauffer v. Exley*. Wallace states in its brief, p. 2, as follows:

"It is submitted that the question of jurisdiction has been conclusively determined by this Court's ruling in *Stauffer v. Exley*, 184 F.2d 962 (C.A. 9)."

and on p. 12 it said that the Judges of this Court:

"conclusively determined the jurisdiction of Federal

Courts under the Lanham Act in the case of *Stauffer v. Exley*, 184 F.2d 962. The instant case is on all fours with the Stauffer case."

Thus, if this Court agrees with Tepco (Tepco brief, pp. 23-27), that this case does not come within the facts of the *Stauffer* case, that Wallace does not have the exclusive right to the subject matter of this suit, then Wallace admits it is out of court.

(2) Wallace does not deny and in effect concedes that these four designs are used merely for decorating hotel china and, therefore, property in them can only be obtained by following the statutory requirements for design patent protection or for copyright protection.

(3) Wallace does not deny and in effect concedes that these four designs are neither protected by Design Letters Patent or by copyright and that the time for so protecting them long since passed. It could not deny this for this was the holding of the Trial Court (R. 85).

(4) It does not and cannot deny and therefore concedes that it voluntarily put each of these designs into commerce without any statutory protection. While Wallace does claim the property right in each of these designs, it does not deny that the exclusive rights to these designs are lost and pass into the public domain merely by voluntarily placing them in commerce without statutory protection.

(5) Wallace does not deny and in effect concedes that the copying of designs in the public domain is neither unfair nor unlawful.

(6) It does not now and never has denied and therefore concedes that the copying of unpatented designs used to decorate china has been practiced in the industry by itself,

as well as others, with substantial benefit to the public (R. 77, Defs. Ex. G, H).

(7) Wallace does not deny and in effect concedes that Tepco, as well as itself, sells only to dealers and further that dealers are familiar with the manner of marking china-ware and indicating the source of manufacture. All Tepco products are individually marked with Tepco's trademark and so each dealer and each purchaser has at all times the customary means for correctly identifying the products at Tepco's (R. 72, 79).

(8) Wallace does not deny and accordingly concedes that there has never been any passing-off of Tepco's products as and for Wallace's products nor is any passing-off alleged in the complaint. It does state that there has been confusion in one or two instances and this is treated later in this brief (see *infra*, p. 10). The fact still stands that there has never been any fraud or deceit by Tepco and there never has been a sale of Tepco products as and for Wallace's products.

(9) Of great significance is the fact that Wallace does not now deny that it is seeking a monopoly in these designs in perpetuity and in contravention of the Design Patent Laws of the United States, as set forth in the Tepco brief, p. 33.

(10) Also of importance is that Wallace does not deny the rule announced in the *Mast, Foos* case, 177 U.S. 485, 495, and its applicability to the unfair competition cause of action (Tepco brief, p. 39). It passes off the reference to this case with a statement that the principle is correct but the facts are different, without making any effort to show what the facts were or how they differ. The principle of

the *Mast, P'oos* case is that a Court of Appeals could, on an appeal from an order granting a preliminary injunction, not only reverse the order for the injunction, but dismiss the complaint prior to the taking of any testimony or the filing of an answer. That is precisely the situation here and the rule is applicable to this case. There is no equity in the complaint for unfair competition and the defects cannot be cured by amendment.

With these important facts and propositions of law in both causes of action not in dispute or controverted by Wallace, much of the Court's labors in connection with this appeal are eliminated.

PART II.

Wallace Errors in Stating the Record

The second part of this brief is devoted to the errors made by Wallace in stating the facts in the record. In most instances they are iterated and reiterated several times, presumably in the useless hope that mere repetition will make them true.

(1) The Wallace brief, although asserting that the four names "Hibiscus", "Magnolia", "Tweed", and "Shadowleaf" are merely trade names, presents a studied confusion and recurrent reference to these same four names as *trade-marks*. The Court will observe that whenever they are referred to as trade-marks, no reference to the record is made, or if made, the record does not support the statement. For example, Wallace brief, p. 3:

"Plaintiff was the first to appropriate certain *trade marks* or trade names for the identification of its china, the names in question being 'Shadowleaf,' 'Tweed,' 'Hibiscus' and 'Magnolia'".

"Plaintiff appropriated and used these specific trade names or *trade marks* to indicate the nature, quality and source of its china (R. 5)." Wallace brief, p. 6.

"Defendant copied plaintiff's patterns, and marked their containers with the same *trade marks* as used by plaintiff * * *" Wallace brief, p. 7.

"These *trade marks* are applied to the containers in which the hotel china is shipped * * *" Wallace brief, p. 9.

"These patterns and *trade marks* are well known in the trade and represent good will and reputation of plaintiff." Wallace brief, p. 9.

"in addition to actual misappropriation of *plaintiff's trade marks* * * *" Wallace brief, p. 13.

"The Use of Identical Trade Marks by Defendants * * *" Wallace brief, p. 16.

The repetition is sufficient to indicate that reference to Wallace ownership of *trade-marks* was not accidental or mere inadvertence.

On the contrary, the allegations are as follows: In the Complaint (R. 5):

"6. Plaintiff alleges that it used and is using distinctive trade names or trade marks to indicate the nature, quality and source of its china; *that among the trade names so appropriated and used by plaintiff are 'Shadowleaf,' 'Tweed,' 'Hibiscus' and 'Magnolia';* that plaintiff uses the said trade names in connection with its china bearing distinctive patterns and applies said trade names to containers in which said china is shipped and sold * * *"

"That Exhibit 1, attached hereto, is a pattern transfer originated by plaintiff and known by the trade name 'Shadowleaf' * * * (R. 6).

"8. Plaintiff alleges that the various trade names and each of them appropriated and used by plaintiff * * *" (R. 6).

"that defendants have copied various of plaintiff's original patterns, including the patterns known by the trade names 'Shadowleaf,' 'Tweed,' 'Hibiscus' and 'Magnolia' * * *" (R. 7).

"Plaintiff alleges that the sale of china by defendants under the trade names first appropriated and used by plaintiff * * *" (R. 9).

There is no reference or allegation in the complaint that these four names are trade-marks. There is also no reference to any trade-mark in the motion for preliminary injunction (R. 21-24) or in the supporting affidavits (R. 24-61) or in the order to show cause (R. 63-64).

(2) Wallace states with finality that purchasers have been deceived and confused by defendants. The Wallace brief says (p. 4):

"Former purchasers of plaintiff purchased defendants' copies, believing them to originate with plaintiff and then complained to plaintiff when the copies developed faults."

"The purchasers have been deceived." Wallace brief, p. 7.

"Such slavish copying has deceived plaintiff's customers." Wallace brief, p. 10.

"This results in deception and confusion to purchasers." Wallace brief, p. 13.

To be sure, the complaint contains allegations that the acts of defendants deceived the public (R. 8) and are calcu-

lated to deceive the public and constitute palming off (R. 9). But these allegations do not establish a *prima facie* showing in view of the denial of the allegations.

The affidavit of Harold K. Robertson, who is an employee of one of Wallace's dealers in Long Beach, is principally relied upon by Wallace to establish the fact of confusion. The affidavit is the hearsay report of one instance which is not identified as to time, place, name or in any other manner. Being completely hearsay, there is no way to test its truth and the statement is said to be supported in the Wood affidavit. However, in checking the record reference, the page is to the Delaney affidavit and not to Wood. Wood, who was president of Wallace, merely stated (R. 42) that he:

"has examined china manufactured and sold by Tepco and bearing said pattern and deponent states that the Tepco ware is deceptively similar to the ware manufactured and sold by Wallace China Co., Ltd. and deceives the public into the belief that the copies are products made by deponent's corporation."

This, obviously, is merely the expression of an opinion and is not founded on any facts. Mr. Delaney is Sales Manager for Wallace and a highly prejudiced affiant. Without in any way identifying what patterns were involved, this affiant merely states (R. 49) that he:

"personally knows that Tepco has sold its copies to restaurants which originally bought Wallace china and that said restaurants were deceived in believing that what they bought from Tepco was a product of Wallace China Co., Ltd.;"

To be sure, the inference is that the statement relates to the four patterns here in suit, but it is a serious matter to grant an injunction and stop a man's business on the basis of inference which has the further fatal defect of being merely hearsay. Here again the statement is of no probative value.

It is upon these, and only these unsupported, hearsay and vague statements that Wallace claims to have made a showing of confusion in the trade. It does not deny and never has denied that all Tepco products bear the Tepco trade-mark and that every purchaser has in his hands, accurate and unassailable means for identifying the source of origin of each piece in the accepted and customary manner so there could not be any fraud or deceit. Likewise it must be remembered that the purchasers are experts—dealers—and are thoroughly familiar with the trade-marks and markings of manufacturers. It does not deny that purchasers may be mistaken and confused without any legal or moral wrong. *Canal Co. v. Clark*, 80 U.S. 311, 327; *Kellogg Co. v. National Biscuit*, 305 U.S. 111. There must be accompanying fraud or deceit, which is not present in this case.

(3) Wallace, in its brief (p. 12), says that Tepco's attack on the jurisdiction of the District Court is not made in good faith because jurisdiction has been admitted, and refers this Court to two places in the record (one of which is incorrect) and to defendants' answer and counterclaim, which is not a part of this record.

If the Court will examine the first reference to the record (R. 105), it will see that this remark was made by counsel during defendants' request for a short extension of time for the hearing on the preliminary injunction. One of the

grounds being urged was the Court's lack of jurisdiction and time to thoroughly research the principle enunciated in *Stauffer v. Exley*. In this connection, this Court is referred to an earlier portion of the record (R. 98). In Wallace's second reference (which should be R. 113), it will be observed that this subject was prefaced by the following quotation (R. 113):

"Now, as I indicated earlier, Your Honor, I think there is a very serious doubt as to the jurisdiction of this case."

And immediately following the quote referred to by Wallace, counsel stated (R. 113):

"But I think also in this case, the Stauffer case there was a distinguishing feature."

Tepco is confident that reference to the text of the record from which these two sentences were lifted will indicate to this Court which party is acting in good faith.

(4) The Wallace brief constantly states Tepco does not urge that the findings of fact and conclusions of law are in error. Samples of such a statement are found in the Wallace brief on pages 4, 8-11.

To show the utter preposterousness of these statements, all that is necessary is to compare Tepco's Concise Statement of Points (R. 144) and the Specification of Errors (Tepco brief, pp. 7-9) with the Findings of Fact and Conclusions of Law (R. 83):

Tepco point 1 (R. 144) and Specification of Error 1 (brief p. 7), with Finding 5 and Conclusion I.

Tepco point 2 (R. 144) and Specification of Error 2 (brief p. 7), with Finding 6 and Conclusion II.

Tepco point 3 (R. 145) and Specification of Error 3 (brief p. 8), with Conclusion III.

Tepco point 4 (R. 145) and Specification of Error 4 (brief p. 8), with Finding 8 and Conclusion IV.

Tepco point 5 (R. 145) and Specification of Error 5 (brief p. 8), with Finding 7 and Conclusion V.

Tepco point 6 (R. 145) and Specification of Error 6 (brief p. 8), with Conclusion VI.

Tepco can only conclude that this flagrant disregard of the record indicates either a complete confusion as to the facts and the law, or a deliberate attempt by Wallace to mislead this Court.

PART III.

Fallacies of the Wallace Arguments

Perhaps the fallacies of the Wallace arguments are best shown by reference to the heading "The Principles Applicable to This Case" (Wallace brief, p. 15) and the authorities which are said to support these principles.

(1) No one denies the general statement that trade-marks and trade names represent good will. But before there can be any property to protect and to which good will can attach, Wallace must first show that it has trade-marks or that it has trade names, and next, that it owns them exclusively. No trade-marks are alleged and so no good will can attach. What Wallace calls trade names in fact are not trade names (Tepco brief, pp. 19-22). Accordingly, Wallace has no property rights in trade-marks or trade names which can be protected by this Court.

(2) It is said that the use of identical trade-marks by the defendants raises a presumption of fraud (Wallace

brief, p. 16). There being no trade-marks involved in this case, there is no use of identical trade-marks which could give rise to any presumption. Likewise, there is no use of trade names which could give rise to constructive fraud.

(3) It is said that Wallace has a property right in the patterns which it originated and used (Wallace brief, p. 16). There can be no dispute that these four designs have no other purpose or function than to decorate hotel china and that such decoration does not in any way change the form, quality, size or shape of the merchandise. The law is, and has been since the case of *Patterson v. Commonwealth*, 97 U.S. 501; 24 L.Ed. 1115 as stated in the Tepco brief (p. 28), a man may protect his new designs by design patents or by copyright, and if he avails himself of the statutory protection he then secures a monopoly in them for a limited period of time, but if he does not, he has no right to exclude others from the free use thereof. Wallace did not see fit to avail itself of statutory protection but allowed its designs to go into the public domain. Accordingly, Wallace does not have the exclusive rights or ownership of these designs which are the subject matter of this suit.

What authority does Wallace show to support its position that it owns these designs? Merely that Wallace employed artists to make them. What ownership can there be apart from ownership authorized by statute and obtained by design patent or copyright when designs are used in commerce?

The cases cited as supporting the Wallace ownership of such designs do not do so. In *McGill Mfg. Co. v. Lebiton Mfg. Co.*, 43 F(2) 607, the District Court held that plain-

tiff's fixtures had acquired a secondary meaning due to the *shape and appearance*. There is no allegation, claim or finding of secondary meaning in the present case.

In *Keller, Inc. v. Chicago Pneumatic Tool*, 298 Fed. 52, 57 (C.C.A. 7) decorative designs were not involved, much less the question of exclusive ownership of designs by merely hiring artists to make them.

In *Krem-Ko Co. v. R. G. Miller and Sons, Inc.*, 68 F(2) 872 (C.C.A. 2), the only design involved was the patented design of a bottle which was held invalid. In view of the invalidity, it was further held that there was no unfair competition by defendant's use of this same bottle, even though he was a former employee and even though he used it, as the plaintiff did, for a chocolate drink, if the public was not deceived. The Court held there was no exclusive property right in the design of the bottle.

In *Stewart v. Hudson*, 222 Fed. 584, 587, no design features were involved and no pattern was before the Court.

In *Baldwin v. Grier Brothers*, 215 Fed. 735, 737, no decorative design or pattern was involved.

Schechter v. U. S., 295 U.S. 531, 532; 79 L.Ed. 1570, 1581 does not apply because there can be no misappropriation of a design which belongs to the public and freely available to everyone.

Wallace would not, or could not, and, in fact, did not secure the statements under oath required for design patent applications (35 U.S.C.A. §35, R.S. 4892) that the artists hired by it to make these four designs were in fact the originators of these designs.

(4) The matter of trade dress is not here involved. The correct rule of law in decorative unpatented designs and their use by the public is set forth in the Tepco brief, pp. 29-32.

In addition the decoration of an article of commerce, the trade dress cannot acquire the status of a trade-mark for the attachment of good will. In *Burgess Battery Co. v. Marzall*, F.S.; 92 U.S.P.Q. 90 (D.C., Dist. Col.—1951) the plaintiff sought to compel registration of the decorative appearance of its battery case as a trade-mark under the Lanham Act. In deciding against plaintiff, District Judge Youngdahl held (p. 91) :

“However, assuming arguendo, that *res judicata* does not bar plaintiff in this case, it seems clear that the design in question is merely the dress of the goods and is inherently incapable of acquiring the status of a trade mark under the 1946 Act.”

(5) Fraudulent intent is presumed from the identity in appearance and words (Wallace brief, p. 19). This, of course, is not the law. The law is, as indicated in the *Shredded Wheat* case, 305 U.S. 111, that where the unpatented design and the generic name for the article are both in the public domain, as is the case here, a person is only required to identify his products so as to reasonably distinguish them from those of other manufacturers. Tepco has identified its products with its own trade-mark and clearly and permanently marked its products to distinguish them from chinaware of other manufacturers.

(6) Wallace states “Unless defendants can show that the findings are in substantial error, the judgment must be affirmed” (Brief, p. 4). This is not the law and certainly it is not the law on questions of Federal Jurisdiction. Defendants do not have the burden of proof on the matter of jurisdiction. Since Federal jurisdiction is wholly statutory, the rule in the Federal Courts is that jurisdiction is never presumed, and the burden is on the plaintiff to prove

facts establishing the Court's jurisdiction. The correct rule is stated in the following Supreme Court cases:

In the opinion of Mr. Justice Hughes in *McNutt v. General Motors Accept. Corp.*, 298 U.S. 178; 80 L.Ed. 1135, it was held (p. 1141):

"The prerequisites to the exercise of jurisdiction are specifically defined and the plain import of the statute is that the District Court is vested with authority to inquire at any time whether these conditions have been met. *They are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor.* He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing.

* * * * *

"The authority which the statute vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose *the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence.*

* * * * *

"There was thus no showing that the District Court had jurisdiction and the bill should have been dismissed upon that ground."

In *KIOS v. Associated Press*, 299 U.S. 269; 81 L.Ed. 183, the opinion by Mr. Justice Roberts holds (p. 188):

“But where the allegations as to the amount in controversy are challenged by the defendant in an appropriate manner, *the plaintiff must support them by competent proof.*

* * * * *

“it did not assume the truth of the bill’s averments and assert that in spite of their truth the complaint failed to state a case within the court’s jurisdiction. On the contrary the motion traversed the truth of the allegations as to amount in controversy and in support of the denial recited facts dehors the complaint.”

The matter of Federal jurisdiction of both causes of action was challenged by Tepco at the hearing (R. 105, 113, 114) and on this appeal (R. 145, brief, p. 8). This placed the burden of proof squarely upon Wallace. That neither Wallace nor the Trial Court inquired into this matter is clear from the following (R. 133) :

“Mr. Miketta: * * * Is your Honor interested in the question of jurisdiction?

“The Court: No.”

There is no proof to support jurisdiction of a Federal Court in either of the two causes of action, and the complaint should have been dismissed on this ground alone. Such a failure is a clear abuse of discretion.

(7) Wallace’s assertion that the Tepco Opening Brief “is so confused and self contradictory that it falls flat and is of no help to either defendants or Your Honors” (Brief, p. 6) brings into focus that the Tepco brief was written and presented as a helpful document to this Court. So far as Wallace is concerned all Tepco can do is supply the ideas and the words to express them, not the intelligence to understand them.

CONCLUSION

Tepco urges the reversal of the Judgment and the dismissal of the complaint according to the rule of the *Mast, Foos Case*, in the interests of justice and to prevent the unnecessary expense and groundless litigation.

Dated at San Francisco, California, this 1st day of February, 1952.

Respectfully submitted,

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